In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-598

JOSEPH JOHN FOURNIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 26, 1971, petitioner entered a plea of guilty to a one count information under 18 U.S.C. 922(g)(1), charging him, as a previously convicted felon, with interstate transportation of a firearm (A.2).[1] Prior to accepting the plea, the court informed petitioner of the elements of the offense to which he was pleading and the possible sentence that could be imposed. Petitioner stated that he had committed the acts alleged and acknowledged that the following factual resume, read by the prosecuting attorney, was correct in all respects (Pet. App. B, 19):

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[1] "A." designates petitioner's appendix filed in the court of appeals, which we are lodging with the Clerk of this Court.

> On July 24, 1971, Joseph John Fournier purchased a Smith & Wesson .38 caliber revolver at Norm's Place, in Patterson, New Jersey.
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> On July 27, 1971, Fournier took the said revolver and left East Patterson, New Jersey, headed for Texas. On the night of July 27, Fournier spent the night at a roadside rest area in Indiana. On July 28, 1971, Fournier arrived in Texas on U.S. Highway 75, still possessing said revolver. On the evening of July 28, 1971, Fournier was observed with his pants down in an alley in Garland, Texas. Subsequently, Fournier was arrested by Garland police officers and said revolver was found in his left front pocket.

Petitioner also admitted that he had been previously convicted in New Jersey of two counts of armed robbery. Following this, the court accepted the guilty plea and on September 17, 1971, sentenced petitioner to three years imprisonment (A. 2-3).

On January 25, 1972, petitioner filed a motion to withdraw his guilty plea.[2] He claimed his plea had not been entered knowingly as he was "unaware of the fact that 18 U.S.C., Section 922(g)(1) did not reach the basic elements of [his] offense." (A. 8-9). Subsequently, petitioner's retained counsel filed a brief supporting and clarifying this position, urging that petitioner's conduct was proscribed by 18 U.S.C. App. 1202(a)(1) which contemplates a class of persons

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[2] He had earlier, on November 18, 1971, filed a letter with the district court which was treated as a motion for reduction of sentence. This motion was denied by the district court (A. 4-7).

termed "convicted felons" rather than 18 U.S.C. 922 (g)(1) which deals with the conduct of "shippers and suppliers." Alternatively he urged that the two statutes covered similar conduct, and that he should not have been subjected to a greater penalty than is authorized under 18 U.S.C. App. 1202(a)(1).

On May 11, 1972, the sentencing court reduced petitioner's sentence from three years to two years, finding that imposition of the three year sentence constituted a denial of equal protection (A. 18-19). Two weeks later, on May 26, 1972, the court vacated the order reducing petitioner's sentence and reinstated the original sentence, reciting that the May 11 order was based on an incorrect interpretation of the law (App. 25-26). The court of appeals affirmed *per curiam* (Pet. App. A.).

1. Petitioner contends that he, a convicted felon, does not come within the purview of 18 U.S.C. 922 (g)(1) as that statute contemplates only a class of persons he terms "shippers and suppliers." The language of the statute provides no support for petitioner's interpretation. The statute makes it unlawful for any person " * * * who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year * * * to ship or transport any firearm or ammunition in interstate or foreign commerce." Nothing in this language supports petitioner's claim that he is exempted because he was not a "shipper" or "supplier." The latter term is not even used in the statute. More to the point, he was unquestionably a "transporter."

Moreover, prior to enactment of Section 922(g)(1) in 1968, the courts had held that the predecessor to that statute (15 U.S.C. 902(e)) formed a proper basis for the prosecution of convicted felons who transported weapons across state lines. See *United States* v. *Virden,* 432 F. 2d 1205 (C.A. 5), *Landsdown* v. *United States,* 348 F. 2d 405 (C.A. 5); *Smith* v. *United States,* 312 F. 2d 119 (C.A. 10). As the Committee report on Section 922(g)(1) [originally proposed Section 922(e)] stated: "The same prohibition is contained in 15 U.S.C. 902(e) of the present Federal Firearms Act * * *" (S. Rep. No. 1097, 90th Cong., 2d Sess., p. 115). While the provisions of 18 U.S.C. 922(g)(1) and 18 U.S.C. App. 1202(a) do overlap to some extent, it is nonetheless clear that Section 922 (g)(1) "prohibits convicted criminals from transporting firearms in interstate commerce." *United States* v. *Bass,* 404 U.S. 336, 343.

2. Alternately, petitioner argues that prosecution should have been brought under 18 U.S.C. App. 1202 (a), with a maximum penalty of two years rather than under 18 U.S.C. 922(g)(1), where the statutory maximum is five years. Where, as here, a defendant's conduct violates overlapping statutes, one punishable by a greater statutory maximum sentence than the other, the choice of which offense to prosecute is a matter within the discretion of the prosecutor. *Mauney* v. *United States,* 454 F. 2d 273 (C.A. 6); cf. *United States* v. *Beacon Brass Co.,* 344 U.S. 43, 45.

3. Petitioner contends that the district court improperly vacated the order of May 11, 1972, reducing petitioner's sentence to two years, and reimposing the

three year sentence. Petitioner argues that by reinstating the three year term, the court impermissibly imposed a more severe penalty (Pet. 7-8).

As noted by petitioner, the order of May 11, 1972, was entered more than eight months after petitioner was sentenced. No direct appeal followed the original judgment of conviction. In these circumstances the sentencing court has 120 days in which to correct or reduce the sentence unless the sentence was illegal. Rule 35 F.R. Crim.P. As we have shown, petitioner's conviction was proper and his three year sentence well within the statutory maximum. Thus, the district court was without jurisdiction to reduce petitioner's sentence on May 11, 1972, and the order of that date was therefore invalid. See *United States* v. *Ellenbogen*, 390 F. 2d 537, 540-541 (C.A. 2), certiorari denied, 393 U.S. 918. By the same token, the court's order of May 26, 1972, reinstating the original sentence, did not have the effect of increasing petitioner's sentence, since he was never under a valid two year sentence. All the court did was set aside its own void act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

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